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FILED

No. 99 1610 APR - 5 2000

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IN THE

Supreme Court of the United States

YSLETA DEL SUR PUEBLO,
Petitioner,

v.

DAVID M. LANEY, ROBERT L. NICHOLS,
ANNE S. WYNNE, EDDIE SANCHEZ,
AND RUDY LUGO,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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32pp

QUESTIONS PRESENTED

The Pueblo, a federally recognized Indian tribe, sued to eject state officials from a piece of property formerly used as a highway maintenance facility, contending that defendants' possession constituted a trespass in violation of federal law.

1. Does the Eleventh Amendment bar suits against state officials under *Ex parte Young* to recover possession of property?

2. Does the decision of the Court of Appeals for the Fifth Circuit that Indian tribes cannot recover possession of real property under *Ex parte Young* violate the federal government's trust responsibility to tribes?

3. Does the Indian Non-Intercourse Act of 1834 abrogate states' Eleventh Amendment immunity to suits by Indian tribes to recover possession of tribal lands?

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PETITION FOR WRIT OF CERTIORARI

Comes now Ysleta del Sur Pueblo, a federally recognized Indian tribe, seeking certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit, and would respectfully show unto the honorable Court as follows:

STATEMENT OF JURISDICTION

The opinion of the Fifth Circuit was entered on January 10, 2000, Appendix at 1a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

OPINIONS BELOW

The Order of the United States District Court for the Western District of Texas denying the Motion to Dismiss on Eleventh Amendment grounds is not reported. The decision of the Court of Appeals for the Fifth Circuit reversing the district court's order and dismissing this case on the grounds of state sovereign immunity, Appendix at 1a, is reported at: *Ysleta del Sur Pueblo v. Laney*, 199 F.3d 281 (5th Cir. 2000).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. XI: The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by another State, or by Citizens or Subjects of a Foreign State.

U.S. Const. amend. XIV § 1: . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV § 5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

25 U.S.C. § 177: No purchase, grant, lease, or other conveyance of lands or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a

penalty of $1,000.00. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to and adjust with the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

STATEMENT OF THE CASE

The Pueblo alleged that the State of Texas, beginning with a specially incorporated city in 1871, dispossessed the Pueblo of land to which it held recognized title. The Pueblo contended that any transactions in the tribal lands under the scheme by which Texas created fraudulent title-chains were void under the Indian Non-Intercourse Act, 25 U.S.C. § 177. Texas relied upon such a fraudulent title-chain in taking possession of the property it used as a highway maintenance facility, and the Pueblo contended that the state officials were trespassing on tribal lands in derogation of federal law as a part of the continuing fraud. The Pueblo sued in federal court to eject the state officials who responded that the Eleventh Amendment barred the Pueblo's suit. The Court of Appeals for the Fifth Circuit agreed with the state officials, rejecting the Pueblo's argument that it sought appropriate relief under the doctrine of *Ex parte Young* and that Congress abrogated Eleventh Amendment immunity in the Indian Non-Intercourse Act.

ARGUMENT

I. Writ should be granted on the first question because the decision below conflicts with this Court's decision in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997).

The Fifth Circuit held that the Pueblo's suit against the state officials to recover possession of the real property could not be maintained under the *Ex parte Young* doctrine because (1) it is a quiet title action and (2) it does not constitute a request for prospective relief. Other Courts of Appeals have reached similar conclusions. See *Fitzgerald v. Unidentified Wrecked and Abandoned Vessel*, 866 F.2d 16 (1st Cir. 1989), and *Toledo, Peoria & Western R.R. v. Illinois Department of Transportation*, 744 F.2d 1296 (7th Cir. 1994), cert. denied, 470 U.S. 1051 (1985).

These holdings conflict with the applicable decision of this Court in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997). In that case, the Tribe sued the State of Idaho and state officials to establish its title and ownership to certain submerged lands underlying navigable waterways within its Reservation, including Lake Coeur d'Alene and various rivers and streams that feed the Lake. The Tribe sought a declaration of possession as against the State officials and an injunction prohibiting the officials from regulating or interfering with the Tribe's possession, as well as an invalidation of all state laws regulating the area.

A plurality of this Court held that under the particular and special circumstances of the case, the *Ex parte Young* exception was inapplicable because the case was the "functional equivalent of a quiet title action which implicates special sovereignty interests." 521 U.S. at 281. Both the majority and concurring opinions noted the special status of navigable waters and the

state's special sovereignty interests in them.[1] The grounds relied upon by the appellate court below to deny the Pueblo's requested *Ex parte Young* relief are the same grounds urged in the briefs of the petitioner and the amici in *Couer d'Alene*,[2] grounds which this Court refused to adopt; instead this Court focused on the "special sovereignty interests" of the subject property.

Instead of focusing its analysis on the "special sovereignty interests" of the subject property to determine whether *Ex parte Young* relief is available, the appellate court below deleted a whole category of suits previously allowable under the doctrine, suits to recover possession of real property. For good reason this Court chose not to sanction the approach employed by the appellate court below. Absent *Ex parte Young* relief, states are free to ignore the restraints of federal law, including the takings clause of the Fifth Amendment, in their acquisition of property rights. The court in *Ysleta del Sur Pueblo v. Texas*, United States Court of Appeals for the Fifth Circuit, Appeal No. 99-50656, held that the Pueblo's suit for money judgment against the state for a Fifth Amendment taking based on the same allegations as in this case was barred by the Eleventh Amendment.[3]

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[1] See 521 U.S. at 283-287, where this Court gives lengthy consideration to ancient doctrines and concluded that "navigable waters uniquely implicate sovereign interests," tracing the development of this proposition through American water law from early Roman and English principles.

[2] See Brief of Petitioner (1996 WL 290997), pp. 11-18, 36-39; Amici Brief of the States (1996 WL 291048), pp. 13-14; and the Amici Brief of the Council of State Governments, et al. (1996 WL 288987), pp.9-14.

[3] The decision in Appeal No. 99-50656 is subject to a petition for certiorari filed contemporaneously with this petition.

II. Writ should be granted on the second question because the decision below departs from the accepted and usual course of judicial proceedings by denying to Indian tribes *Ex parte Young* relief not denied to others.

The appellate court below also denied the Pueblo's request for *Ex parte Young* relief because the state might lose regulatory control over the property thus, apparently, implicating special sovereignty interests. It is the status of the Pueblo as an Indian tribe that results in any loss of regulatory control by the state over the property. Unless Congress provides otherwise, however, state regulatory control is always diminished over lands held by Indian tribes. Making "loss of regulatory control" the basis for denying *Ex parte Young* relief discriminates against Indian tribes by denying them the access to the federal courts which is available to others.

This Court in *Coeur d'Alene* did not make the status of the petitioner the touchstone for denying *Ex parte Young* relief; instead the court examined the nature of the property in determining whether special sovereignty interests are implicated. In *Coeur d'Alene* the property was the submerged beds and banks of navigable waterways, not, as in the case at bar, a piece of property formerly used as a highway maintenance facility and alleged to be for sale.

The discriminatory effect of the decision violates the federal trust obligation to Indian tribes. It is the law of the land that Indian tribes are to be protected, while in peace, in the possession of their lands. *Johnson v. McIntosh*, 21 U. S. (8 Wheat.) 543, 591 (1823) (Marshall C.J.). The overall design of the Non-Intercourse Act is to protect the rights of Indians to their properties. *County of Oneida v. Oneida Indian Nation ("Oneida II")*, 470 U.S. 226, 239 (1985), citing *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 664 (1979). The design includes "put[ting] in statutory form what was or came to be the

accepted rule - that the extinguishment of Indian title required the consent of the United States." *Oneida II* at 240, quoting *Oneida Indian Nation v. County of Oneida ("Oneida I")*, 414 U.S. 661, 678 (1974). The Act applies to states. Oneida I, at 667. The "design" left intact the federal common law right of Indian tribes to sue to enforce their land rights when the accepted rule is violated. *Oneida II* at 240. The Indian Non-Intercourse Act is the federal government's codification of its trust obligation to protect Indian tribes in the peaceful enjoyment of their lands. Denial of Ex parte Young relief by the appellate court below based on the status of the Pueblo vitiates, rather than fulfills, the trust responsibility encompassed in the Indian Non-Intercourse Act.

III. Writ should be granted on the third question because the Fifth Circuit's application of modern Eleventh Amendment jurisprudence principles to the Indian Non-Intercourse Act violates the federal government's trust obligation to Indian tribes.

Recent decisions by this Court narrowly circumscribe the ability of Congress to abrogate Eleventh Amendment immunity: Congress must unequivocally express its intent to abrogate, *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 468, 478 (1987); Congress possesses power to abrogate Eleventh Amendment immunity under section 5 of the Fourteenth Amendment, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1975), but not under Article 1 of the Constitution, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); and, Congress must identify the conduct transgressing the Fourteenth Amendment's substantive provisions and tailor its legislative scheme to remedying or preventing such conduct, *Florida Prepaid Post secondary Education Expense Board v. College Savings Bank*, __ U.S. __, 119 S. Ct. 2199, 2207 (1999). Application of these principles to the Indian Non-Intercourse Act, enacted more than 150 years earlier, is inappropriate. As stated above, the Indian

Non-Intercourse Act codifies the federal government's trust obligation to protect Indian tribes in the peaceful enjoyment of their lands. The power of the federal government to deal with Indian tribes, and with those who deal with the tribes, arises from this trust obligation:

> . . . . Indian Tribes *are* the wards of the Nation. They are communities *dependent* on the United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

United States v. Kagama, 118 U.S. 375, 383-84 (1886) (emphasis in the original). At the time Congress enacted the Indian Non-Intercourse Act,[4] it had the obligation and the power to protect Indian tribes in the peaceful enjoyment of their lands. At the time Congress enacted the Indian Non-Intercourse Act, this Court had twice ruled that states cannot assert the defense of sovereign immunity from suit to defeat the jurisdiction of federal court. *Chisholm v. Georgia*, 2 U.S. (Dall.) 419 (1793)

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[4] See 1 Stat. 137, Act of July 22, 1790, § 4; 1 Stat. 469, Act of May 19, 1796, § 12; 1 Stat. 743, Act of March 3, 1799, § 12; 2 Stat. 139, Act of March 30, 1802, § 12; 4 Stat. 729, Act of June 30, 1834, § 12, now codified at 25 U.S.C. § 177. "[T]he Statutory restraint on alienation of Indian tribal land adopted by the Nonintercourse Act of 1793 is still the law. See 25 U.S.C. §177." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 245 n. 16 (1985) ("*Oneida II*").

(pre-Eleventh Amendment), and *Cohens v. Virginia*, 19 U.S. (Wheat.) 264, 412 (1821) (post-Eleventh Amendment). At the time Congress enacted the Indian Non-Intercourse Act, it was not required to unequivocally express its intent to abrogate Eleventh Amendment immunity -- an immunity this Court would not find until the year 1890. *Hans v. Louisiana*, 134 U.S. 1 (1890).

At the time Texas is alleged to have violated the Indian Non-Intercourse Act in 1871, Congress possessed power under section 5 of the Fourteenth Amendment to abrogate Eleventh Amendment immunity (which, at the time, did not exist), but Congress did not know, and would not know for 125 years, section 5 provided its only power to abrogate Eleventh Amendment immunity. At the time Texas is alleged to have violated the Indian Non-Intercourse Act, Congress did not know, and would not know for 126 years, of its "identify and tailor" requirements in legislating pursuant to section 5 of the Fourteenth Amendment.

Application of modern Eleventh Amendment jurisprudence principles to the Indian Non-Intercourse Act judicially exempts acts of states from that specific piece of legislation designed to fulfill the federal government's trust obligation to protect Indian tribes in the peaceful enjoyment of their lands. By suggesting that Congress, on the eve of the 21st century, can amend the Indian Non-Intercourse Act to comply with modern Eleventh Amendment jurisprudence principles, the Fifth Circuit sweeps under the rug of history last century' racially-motivated policies of genocide by which Indian tribes were dispossessed of their lands by states. The failure of the Fifth Circuit to find abrogation of Eleventh Amendment immunity in the Indian Non-Intercourse Act marks yet another broken promise of the federal government to protect the lands of Indian tribes. Will this Court allow the Courts of Appeals to be the instrument that

breaches the trust relationship between the federal government and the Indian tribes?

CONCLUSION

The Pueblo respectfully requests that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

[Filed Jan. 10, 2000]

REVISED JANUARY 13, 1999

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50575

YSLETA DEL SUR PUEBLO,
Plaintiff-Appellee

v.

DAVID M. LANEY; ROBERT L. NICHOLS; ANNE S. WYNNE; EDDIE SANCHEZ; AND RUDY LUGO,
Defendants-Appellants

Appeal from the United States District Court
for the Western District of Texas.

January 10, 2000

Before KING, Chief Judge, and REYNALDO G. GARZA, and EMILIO M. GARZA, Circuit Judges.

REYNALDO G. GARZA, Circuit Judge:

BACKGROUND

Ysleta del Sur Pueblo (the "Tribe" or the "Pueblo"), a federally recognized Indian Tribe, filed suit in federal district court, seeking to eject David M. Laney, Robert L. Nichols, Anne S.

Wynne, Eddie Sanchez, and Rudy Lugo, present commissioners of the Texas Transportation Commission, and two employees of the Texas Department of Transportation, in their individual capacities ("Appellants"), from a piece of real property (the "Property") which currently serves as a highway maintenance facility in El Paso County, Texas. The tribe also requested that the Appellants remove their equipment and "all hazardous and environmentally damaging material" from the Property. The Pueblo alleges that the Appellants are trespassing in violation of federal law.

The Pueblo is an indigenous Native American Tribe that was originally situated in Isleta [anglicized spelling], New Mexico, where from time to time it received population accretions from the Pueblos of Abu, Quari, and Grand Quivara.[1] In 1680, during the Pueblo Revolt, a portion of the Pueblo migrated south with retreating Spaniards and occupied camps in the present day El Paso vicinity. In 1682, Spanish Governor Otermin attempted to reconquer New Mexico, attacking the Isleta Pueblo, reducing it to his control and relocating it to the El Paso area with the Pueblo members who had fled New Mexico in 1680. In 1682, the Pueblo was situated at its present site in what is now El Paso County, Texas.

In 1751, the Governor of New Mexico granted land, including the Property, to the Pueblo. Neither its legal title nor aboriginal right to the Property was ever terminated by the Kingdom of Spain, the Republic of Mexico, or the Republic of Texas, the successive governments claiming sovereignty over the area in-

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[1] In summarizing the factual background of this case, we have relied, in large part, upon the Tribe's First Amended Complaint, filed November 25, 1997. The facts alleged in the First Amended Complaint as they pertain to the historical origins of the Pueblo and relationship to the Property, remain undisputed.

cluding the Property prior to the United States.[2] In 1845, Texas was admitted to the Union, sparking the Mexican-American War, which ending in 1848 with the signing of the Treaty of Guadalupe Hidalgo. Article VIII of the treaty guaranteed the protection of the title held by Mexican citizens to land in the United States, and members of the Tribe were, at the time the treaty was signed, Mexican citizens.

The Pueblo contends that between 1846 and 1850, the federal government acknowledged the Tribe's interest in its lands. Nonetheless, the State of Texas (the "State"), evidently claiming or believing it held title, relinquished the Tribe's land, including the Property, to a municipality. The Property was at some later time conveyed back to the State, and the State is the current title holder of record. The Pueblo argues that the State's action violated the Trade and Intercourse Act, referred to as the Indian Nonintercourse Act (the "NIA").[3] It claims that because of the

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[2] According to the Complaint, the Republic of Texas claimed land including the Property but never exercised government control over it.

[3] Congress enacted the NIA in 1790. The Act was amended and repassed in 1793, 1796, 1799, 1802, and 1834. It is now codified at 25 U.S.C. § 177 and provides:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

violation of the NIA, the State's relinquishment of the Property and all subsequent conveyances are null and void, making Appellants' continued occupation of the Property illegal.

Appellants filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). In the motion, they asserted that the suit is barred by the Eleventh Amendment to the United States Constitution.[4] In an order entered January 26, 1999, the district court denied the motion after concluding that "Congress clearly intended to abrogate the States' Eleventh Amendment immunity when it enacted the Nonintercourse Act and Congress has the power to do so under the Indian Commerce Clause." [5]

ANALYSIS

I.

This court has jurisdiction, under the collateral order doctrine, to entertain an appeal of the denial of a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss based upon a claim of Eleventh Amendment sovereign immunity. *See Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.* 506 U.S. 139, 141 (1993). We review "Eleventh Amendment immunity determinations, like other questions of subject matter jurisdiction, de nova as a question of law." *United States v. Texas Tech Univ.*, 171 F.3d 279, 288 (5th Cir. 1999).

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[4] The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another States, or by Citizens or Subjects of any Foreign State." U.S. Const., Amend. XI. In addition, in *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504, 33 L.Ed. 842 (1890), the Supreme Court broadened the States' Eleventh Amendment immunity in federal courts and interpreted the Amendment to allow States immunity from federal suits by their own citizens.

[5] "The Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes; . . . ." U.S. Const. Art. I, § 8, cl. 3.

II.

We hold that the State of Texas enjoys immunity, under the Eleventh Amendment, from a suit instituted by an Indian Pueblo alleging a cause of action arising under the NIA, 25 U.S.C § 177. The Eleventh Amendment constitutes an important limitation on federal authority to review allegedly illegal or unconstitutional actions of state governments and their officers. And yet, our federal system requires that we protect state autonomy while promoting state compliance with federal law. Consequently, several methods of circumventing the Eleventh Amendment's prohibition against suing states in federal court have arisen. Under the Eleventh Amendment, a state enjoys immunity from a suit instituted in a federal court by an Indian tribe,[6] unless the state expressly waives its sovereign immunity,[7] its immunity is properly abrogated by Congress,[8] or the suit "falls within the exception . . . recognized for certain suits seeking declaratory and injunctive relief against state officers in their individual capacities." [9] The Eleventh Amendment's applicability to this case turns on whether this is a suit against the State, and if so, whether Congress validly abrogated state sovereign immunity in the NIA or whether the Pueblo may proceed under the doctrine of *Ex parte*

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[6] Eleventh Amendment immunity is effective against Indian tribes and their members. *See Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 268-269 (1997).

[7] *See College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S.Ct. 2219, 2226 (1999) (holding that a state cannot impliedly waive sovereign immunity). *College Savings* had not been decided at the time the parties submitted their briefs; however, neither argued that the state impliedly waived its sovereign immunity. It is clear in this case that the State has not expressly waived its sovereign immunity.

[8] *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55 (1996).

[9] *Coeur d'Alene*, 521 U.S. at 269 (discussing exceptions first recognized in *Ex parte Young*, 209 U.S. 123 (1908)).

Young.[10] We hold that this is a suit against the State, that Congress did not abrogate state sovereign immunity in the NIA, and that the Pueblo may not proceed under the *Ex parte Young* doctrine.

III.

First, before we analyze the issue of congressional abrogation of state immunity, we must determine whether the instant suit is one against the State. Often, suits stating a cause of action under a particular statute name both the state and state officials, in their individual capacities. Under those circumstances, a plaintiff mounts an attack against the state by arguing that the statute at issue abrogates sovereign immunity. If the court finds valid abrogation, both prospective and retroactive relief are available against the state. If however, the particular statute has not properly abrogated state sovereign immunity, the plaintiff may nevertheless challenge the action of the state officials under the *Ex parte Young* doctrine, for prospective relief. *See, e.g., Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996) (unsuccessfully arguing both abrogation against the state and the doctrine of *Ex parte Young* against a state official).

In the instant case, the Pueblo has not expressly named the State of Texas or one of its agencies as a defendant, but rather only certain state officials. In *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), the Supreme Court examined whether a suit against state officials, alleging a violation of state law and seeking prospective relief could be maintained under the doctrine of *Ex parte Young*. In deciding that it could not, the Court discussed whether the suit was actually against the State:

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[10] *Ex parte Young*, 209 U.S. 123 (1908) (holding that the Eleventh Amendment does not bar suits against state officers to enjoin violations of federal law).

> There may be a question, however, whether a particular suit in fact is a suit against the State . . .
>
> When the suit is brought only against state officials, a question arises as to whether that suit is a suit against the State itself. Although prior decisions of this Court have not been entirely consistent on this issue, certain principles are well established. The Eleventh Amendment bars a suit against state officials when the . . . state is the real, substantial party in interest. Thus [t]he general rule is that relief . . . sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter. . .
>
> The Court has recognized an important exception to this general rule: a suit challenging the constitutionality of a state official's action is *not one against the State*. This was the holding of *Ex parte Young* . . .

Id. at 101-102 (footnote, citations, and internal quotation marks omitted and emphasis added). The Court explained in a footnote: "The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting or to compel it to act." *Id.* at 101 n.11.

For purposes of addressing congressional abrogation of immunity, we recognize that the State is the true party of interest in this case, although it has not been expressly named as a defendant. The State is the real party of interest because the State holds record title to the Property, utilizes the Property as a maintenance facility, and the Pueblo is attempting to persuade us to declare that title null and void. For purposes of deciding whether the *Ex parte Young* doctrine is applicable in the instant case, we acknowledge that the state officials are named in their individual capacities. *See, e.g., Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (letting stand a lower court decision granting prospective relief and addressing abrogation for purposes of retrospective relief in

a case naming only state officials as defendants). As the Court stated in *Idaho v. Coeur d'Alene*, 521 U.S.261, 270 (1997), "The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleadings."

IV.

Having determined that this is a suit against the State, we now address the question of whether Congress validly abrogated state sovereign immunity in the NIA. We hold that Congress has not. To validly abrogate state sovereign immunity, Congress must " 'unequivocally express . . . its intent to abrogate the immunity,'. . . and second, . . .[it must act] 'pursuant to a valid exercise of power.' " *Florida prepaid Postsecondary Ed. Expense Bd. v. College Sav. Bank*, 119 S.Ct. 2199, 2205 (quoting *Seminole Tribe*, 517 U.S. at 55).

Appellants argue that, *Seminole Tribe*, Congress' intent to abrogate state sovereign immunity must be unmistakably clear in the statute. The NIA, they argue is silent as to abrogation.[11] The Pueblo relies primarily on *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1984) ("*Oneida II*"), in arguing that the NIA provides a clear statement of Congress' intent to abrogate state sovereign immunity. First, the Pueblo asserts that federal

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[11] Indeed, Appellants argue that the NIA is not applicable to the states at all, presumably even in a suit by the United States. The 1790 version of the NIA provided that "no sale of lands made by any . . . tribe . . . shall be valid to any person or persons, or to any state . . . ."

Subsequent versions deleted the reference to person, persons, and states. The current version of the act provides that "[n]o purchase . . . . shall be of any validity in law or equity . . . ." Appellants assert that this change in language evinces Congress' intent to exclude the states from application of the statute altogether. Appellants' argument is without merit. See *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974) (*Oneida I*) (citing the current NIA for the proposition that the invalidity of the sale of Indian lands absent federal consent to, inter alia, states "has remained the policy of the United States to this day") .

law applies to transactions in Indian land. The NIA, it argues, invalidates unauthorized transactions and imposes sanctions on violators. The NIA, it maintains, was intended to apply to both individuals and the states, and Congress' original intent in passing the NIA was to provide a federal forum for the adjudication of Indian concerns. The Pueblo concludes, therefore, that the NIA contemplates state liability in federal courts and is a clear statement of Congress' intent to abrogate states' sovereign immunity.

Appellants respond that the Tribe's reliance on *Oneida II* is misplaced. *Oneida II*, they argue, dealt with whether the NIA provides tribes a private cause of action, not with whether the statute waives sovereign immunity. The State of New York, they point out, was not even a party to the suit.

Contrary to the Tribe's assertion, *Oneida II* does not imply a private cause of action for Indians under the NIA. Indeed, the Supreme Court specifically declined to reach that issue.[12] The text of the statute does appear, however, to apply to the states in its invalidation of *any* unauthorized transaction. Even assuming an implied private cause of action, however, the Tribe makes a fatal logical leap by concluding that a congressional intent to abrogate state sovereign immunity flows from the fact that an implied private cause of action exists under a statute applicable to states and private individuals. The leap is especially large considering the historical relationship between the Unites States and

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[12] *Oneida II* dealt with the 1893 version of the NIA. In that case, the Supreme Court remarked:

> [Both lower courts found] that the Oneidas had the right to sue on two theories: first, a common-law right of action for unlawful possession; and second, an implied statutory cause of action under the Nonintercourse Act of 1793. We need not reach the latter question as we think the Indians' common-law right to sue is firmly established.

47 U.S. at 233.

the Indians.[13] The statute could easily be determined to provide tribes an implied private cause of action against any party other than a state while reserving for the United States a cause of action as fiduciary against any party, including a state. *Seminole Tribe* provides that:

> Congress' intent to abrogate the States' immunity from suit must be obvious from a clear legislative statement . . . [A] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment . . . Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.

517 U.S. at 55-56 (internal citations and quotation marks omitted). The statute, on its face, does not provide an unmistakably clear intent to abrogate state sovereign immunity. Nor does the Tribe point to any statement by Congress in the 200 years since the NIA's initial passage indicating an intent to abrogate state sovereign immunity. Congress certainly could have amended the statute following the passage of the Eleventh Amendment to include a clear statement of abrogation if it had so desired, but it never did.

V.

In *Seminole Tribe*, the Supreme Court overruled its holding in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), that Congress can rely on its Commerce Clause power to abrogate state sovereign immunity. In doing so, the Court stated, "The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Seminole Tribe*, 517 U.S.

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[13] *See, e.g., Montana v. United States*, 450 U.S. 544 (1981) (adjudicating a case brought by the United States in its own right and as a fiduciary for an Indian tribe).

at 72-73. Any argument that this statement was dicta and that the holding applied only to the Commerce Cause power was put to rest in *Florida Prepaid*. There, the Supreme Court stated, "*Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers . . . ." *Florida Prepaid*, 119 S.Ct. at 2205. The Tribe's argument, therefore, that abrogation is justified by Congress' War Powers is misplaced.

Equally misplaced is the Tribe's reliance on Congress' power in Section 5 of the 14th Amendment. The NIA was originally passed in 1790; the second NIA was passed in 1793, and the language of that act was carried forward in several future acts concluding with an act in 1834. *See Oneida I*, 414 U.S. as 668 n.4. The Eleventh Amendment was ratified in 1798. In any event, the alleged violation was a violation of the 1834 NIA. The Fourteenth Amendment was not ratified until 1868.

It is nonsensical to rely on the Fourteenth Amendment to justify abrogation under a statute passed before its ratification. The Pueblo cites no authority for the proposition that Congress, in passing the NIA, could abrogate state sovereign immunity under a power not yet granted to it.

VI.

The district court did not address whether this suit may proceed under the *Ex parte Young* doctrine. However, as we now find that the district court erred with respect to abrogation, it becomes necessary to decide if the Pueblo may proceed with its suit against the state officials under *Ex parte Young*. Generally speaking, the Eleventh Amendment allows suits against state officers, however, whether a state officer may be sued depends, largely, on the claim presented and the nature of the relief sought.

Appellants argue that this is an action to quiet title, citing *Idaho v. Coeur d'Alene*, 521 U.S. 261 (1997), for the proposition that quiet title actions against states cannot be adjudicated in the

federal courts. In *Coeur d'Alene*, a tribe sought to quiet title to the submerged land and beds of Lake Coeur d'Alene and various surrounding waterways. *See id.* at 254. A plurality of the Court held that the *Ex parte Young* doctrine was inapplicable to the case. *Id.* The Tribe asserts that the State's title is null and void and that it has superior title, seeking to eject the state officials from the property.

Moreover, Appellants argue, the Tribe's assertion that the relief it seeks is merely prospective has been rejected in *John G. And Marie Stella Kenedy Memorial Foundation v. Mauro*, 21 F.3d 667 (5th Cir. 1994). In that case, the Foundation asserted ownership over certain land in the possession of the state of Texas.[14] Appellants cite this case for the proposition that an action to put a plaintiff in possession of real property held by the state is a quiet title action forbidden by the Eleventh Amendment, and that ordering the state to relinquish property was the equivalent of recovering damages against the state. This court held that the plaintiff's complaint was an action to quiet title, stating that a federal court "does not have the power to adjudicate the State's interest in property without the State's consent." *Id.*

Appellants distinguish the instant case from *Florida Dep't of State v. Treasure Salvors*, 458 U.S. 670 (1982). There, the Supreme Court held that the state had no colorable claim to title in the disputed personal property. Here, Appellants urge, as was the case in *Mauro*, the State has a colorable claim to title.

The Pueblo relies on *Coeur d'Alene*, arguing that in the case the Supreme Court reaffirmed the doctrine of *Ex parte Young*. The Tribe maintains that the Supreme Court declined to apply the *Ex parte Young* doctrine in *Coeur d'Alene* because of the particular relief sought—a quiet title action seeking to divest the

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[14] It appears from the opinion that the land, which was sometimes covered by the Laguna Madre, may have been characterized as submerged lands.

state of any regulatory power over the disputed property—and the type of real property at issue, submerged lands. According to the Pueblo, Justice O'Connor's concurrence makes clear that in cases involving ordinary land, a distinction can or made between possession and title. Here, as in *United States v. Lee*, 106 U.S. 196 (1882), and *Tindal v. Wesley*, 167 U.S. 204 (1897), the Tribe argues, regular land is involved, and a distinction can be made between possession and title. That is, according to the Tribe. *Coeur d'Alene* vitiates *Mauro*.

Appellants respond that Texas has special interests equal to those of Idaho in *Coeur d'Alene*. The land at issue here is located in a highly developed area, used for highway construction, maintenance and operation, and has many improvement that help facilitate the purposes which it serves. According to the Appellants, the State will be unable to properly carry out its sovereign responsibilities with regards to state roadways if it loses possession of the property. Appellants note that this case should not be viewed any differently than a case where plaintiffs seek to take possession of land upon which a state highway has been construed.

In *Coeur d'Alene*, Justice O'Connor's concurrence sets forth the controlling test with regard to *Ex parte Young* as whether "a plaintiff alleges an ongoing violation of federal law, and [whether] the relief sought is prospective rather than retrospective." *Id.* at 294. Justice O'Connor observed, however, two important distinctions between this case and a normal *Ex parte Young* action: this was an action to quiet title, and the tribe sought to divest the state of all regulatory power.

Justice O'Connor distinguished *United States v. Lee* and *Tindal v. Wesley* on the grounds that, in those cases, possession could be distinguished from title. "A court could find that the officials had no right to remain in possession, thus conveying all the incidents of ownership to the plaintiff, without formally divesting the state of its title." *Id.* at 290. Justice O'Connor argued

that in the case before the Court, the state would lose all regulatory power over the property.[15]

There are two main problems with the Tribe's arguments. First, the Tribe has not sufficiently distinguished its own case from a quiet title action, and second, *Coeur d'Alene* did not vitiate *Mauro*. The Tribe asserts in its First Amended Complaint that "The Pueblo retains legal title to all lands described in the Relinquishment Acts, as well as the right to possess those lands over which it exercised aboriginal possession on December 29, 1845." By seeking to eject Appellants, the Tribe is asking this court to determine that the State has no title to the Property because title rests in the Pueblo. Additionally, the Tribe's argument that the State will retain sufficient regulatory control over the Property rings hollow. A judgment for the Tribe will significantly alter the State's regulatory control over the Property because the Property will be considered part of an Indian reservation under federal control. Moreover, the State here, unlike Florida in *Treasure Salvors*, has a colorable claim to title: the Tribe was not federally recognized until the 1900's, so there is a question whether it would have even retained legal title to land held by it when Texas became a state.

Justice O'Connor's concurring opinion in *Coeur d'Alene* deals specifically with submerged lands and avoids the topic of other pieces of real property. Also, there is no rationale for denial of *Ex parte Young* treatment in that case that represents the views of a majority of the Court. The Tribe therefore incorrectly relies on a statement in Justice O'Connor's concurrence to declare

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[15] Justice O'Connor states:

"Whenever distinction can be drawn between possession and ownership of real property in other contexts, it is not possible to make such a distinction for submerged lands . . . In my view, because a ruling in the Tribe's favor, in practical effect, would be indistinguishable from an order granting the Tribe title to submerged lands . . . . they *Young* exception to the Eleventh Amendment's bar is not properly invoked here." *Id.* at 291.

Mauro, a case involving real property in another context, vitiated. Justice O'Connor set other contexts aside when she stated, "Whatever distinction can be drawn between possession and ownership of real property in other contexts, ..." *Coeur d'Alene*, 521 U.S. at 291. *Mauro* controls and the Tribe's attempt to fit this case within the doctrine of *Ex parte Young* must fail.

CONCLUSION

We hold that the State of Texas enjoys immunity, under the Eleventh Amendment, from a suit instituted by an Indian pueblo alleging a cause of action arising under the NIA. Accordingly, we find that the district court erred in denying the Appellants' Rule 12(b)(6) motion to dismiss, and we therefore REVERSE and RENDER, dismissing this case on the grounds of state sovereign immunity.

[Filed Jan. 10, 2000]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-50575
D.C. Docket No. P-97-CV-101

YSLETA DEL SUR PUEBLO,
Plaintiff-Appellee

v.

DAVID M. LANEY; ROBERT L. NICHOLS; ANNE S. WYNNE; EDDIE SANCHEZ; RUDY LUGO,
Defendants-Appellants

Appeal from the United States District Court
for the Western District of Texas, Pecos

Before KING, Chief Judge, and REYNALDO G. GARZA, and EMILIO M. GARZA, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed and rendered, dismissing this case on the grounds of state sovereign immunity.

IT IS FURTHER ORDERED that plaintiff-appellee pay to defendant-appellants the costs on appeal to be taxed by the Clerk of this Court.

Issued as Mandate: Feb. 1, 2000.